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Supreme Court, U.S.
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No. 91-1844

In The

Supreme Court of the United States

October Term, 1991

WAYNE SNOW, JR., CHAIRMAN, Georgia State Board of Pardons and Paroles,

Petitioner,

v.

ISAAC GRAHAM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

By order of the Honorable J. L. Edmondson, Judge, United States Court of Appeals for the Eleventh Circuit, dated April 19, 1991, the undersigned, R. Scott Tewes, was appointed as counsel for Respondent, Isaac Graham, pursuant to Eleventh Circuit Addendum 5 to file a supplemental brief on his behalf, to present oral arguments, and to represent him in further proceedings before that Court. Respondent was granted leave to proceed *in forma pauperis* by the United States Court of Appeals for the Eleventh Circuit.

The Petitioner's Statement of the Case outlines the general history of the case. The additional facts contained in the opinion below, *Graham v. Snow,* No. 90-8660 (11th Cir. 1992) (Petitioner's Appendix A), are incorporated by reference.

REASONS FOR DENYING THE WRIT

A. THE QUESTIONS PRESENTED BY THE PETITIONER WERE NOT FULLY BRIEFED AND ARGUED BELOW.

This case is inappropriate for certiorari because the Petitioner did not fully brief and argue before the Eleventh Circuit panel the questions presented here. The cornerstone of Petitioner's argument before this Court is that *Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991), the case principally relied upon by the Eleventh Circuit panel in deciding *Graham,* is inconsistent with this Court's decision in *Collins v. Youngblood,* 110 S. Ct. 2715 (1990). Yet in

his principal brief in the Eleventh Circuit, Petitioner made only a passing reference to *Collins:* "In fact, the *Akins* decision is contrary to the recent Supreme Court decision of *Collins v. Youngblood,* 497 U.S. ___, 110 S. Ct. 2715 (1990), which defined the parameters of the ex post facto clause so as to exclude parol eligibility from its scope." Brief of Appellees at 8, *Graham v. Snow,* No. 90-8660 (11th Cir. 1992). In its "Statement of the Issues" below, Respondent not only failed to raise any inconsistency between *Akins* and *Collins,* but stated that, in light of *Akins,* there was nothing to argue:

> There are no issues before this Court, Defendants concede that this case is controlled by the recent Eleventh Circuit decision in *Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991).

Id. at 2. Consequently, the panel observed that "[t]he State conceded in a supplemental brief and at oral argument that *Akins* controls this case." *Graham v. Snow,* No. 90-8660 (11th Cir. 1992) (Petitioner's Appendix A at 4a).

Petitioner first briefed the questions presented for review by this Court in its Petition for Rehearing. Petition for Rehearing at Suggestion of Rehearing En Banc on Behalf of Appellees, *Graham v. Snow,* No. 90-8660. The Eleventh Circuit was not required to address issues presented for the first time in a petition for rehearing. *Holly v. Seminole County School Dist.,* 763 F.2d 399, 400-01 (11th Cir. 1985); *accord Browning v. Navarro,* 894 F.2d 99, 100 (5th Cir. 1990).

This Court should not exercise its discretion to review the decision of a panel before which the questions

now raised were never fully presented. *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

B. THIS COURT RECENTLY HAS DECLINED TO REVIEW BOTH ISSUES ADVANCED BY PETITIONER.

The Petition for Writ of Certiorari should be denied because this Court recently has declined to review both issues advanced by Petitioner. This case presents nothing new to warrant review of those issues now.

Petitioner first argues that the Eleventh Circuit erred in relying on *Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991), because the Supreme Court in *Collins v. Youngblood,* 110 S. Ct. 2715 (1990), expressly overruled the standard used in *Akins* to determine whether the rule at issue violated the ex post facto clause of the United States Constitution. Petitioner made the same argument in a petition for writ of certiorari in June 1991 following the Eleventh Circuit's decision in *Akins.* This Court appropriately denied the petition. *Akins v. Snow,* 111 S. Ct. 2915 (1991).

Petitioner next argues that a parole board rule that fixes the time for an inmate's parole reconsideration review is not a "law" subject to the ex post facto clause of the United States Constitution. Petitioner relies on *Bailey v. Gardebring,* 940 F.2d 1150 (8th Cir. 1991), in an attempt to show a conflict among the circuits on this issue. In March 1992, this Court denied a petition for writ of certiorari to review *Bailey* and its interpretation of what is a "law" within the meaning of the ex post facto clause. *Bailey v. Noot,* 112 S. Ct. 1516 (1992). The asserted conflict with *Akins'* interpretation of the meaning of the term

"law" as used in the ex post facto clause existed when the Court denied certiorari in *Bailey;* therefore, the Eleventh Circuit's decision in this case presents nothing new for the Court to decide.

In short, none of the facts or circumstances of this case make it more appropriate for review by this Court than *Akins* or *Bailey.*

C. THE DECISION OF THE ELEVENTH CIRCUIT IS CONSISTENT WITH *COLLINS V. YOUNGBLOOD,* OTHER DECISIONS OF THIS COURT, AND THE DECISIONS OF OTHER CIRCUIT COURTS.

In *Collins v. Youngblood,* 110 S. Ct. at 2719, this Court reaffirmed the understanding of the ex post facto clause set forth in *Calder v. Bull,* 3 Dall. 386 (1798). The ex post facto clause is violated by "every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed." *Id.* at 390.

There is no dispute that when Respondent committed the crimes for which he was convicted, the rules of the Georgia State Board of Pardons and Paroles (the "Board") provided that prisoners serving life sentences would be eligible to be considered for parole after seven years and, if denied, reconsidered annually thereafter. In 1985 the rule on eligibility for reconsideration was changed to the substantial detriment of Respondent. When he committed the crimes for which he received life sentences, the Board was required to reconsider him for parole annually after an initial denial. Now the Board is required to consider

him no more frequently than every eight years. Respondent has made no claim of a right to parole or a "liberty interest" in parole. His position, and that of the Eleventh Circuit, is that the 1985 change in the Board's rule on eligibility for reconsideration after an initial denial was a substantial increase in his punishment.

It has long been accepted that parole eligibility may be considered part of the punishment for a crime and that retrospective changes in parole eligibility rules make punishment more burdensome in violation of the ex post facto clause. In *Warden, Lewisburg Penitentiary v. Marrero,* 417 U.S. 653, 658 (1974), this Court stated:

> Although, of course, the precise time at which the offender becomes eligible for parole is not part of the sentence . . . , it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can be properly viewed as being determined – and deliberately so – by the sentence of the District Judge.

In dictum this Court went on to state that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause . . . of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the . . . offense.' " 417 U.S. at 663 (quoting *Rooney v. North Dakota,* 196 U.S. 319, 325 (1905)).

Numerous circuit courts addressing changes in parole eligibility have concluded that such changes amount to an increase in punishment. *See Schwartz v. Muncy*, 834 F.2d 396, 398 (4th Cir. 1987) ("The fixing of his parole eligibility date, which was part of his punishment, could not constitutionally be made 'greater or more severe.' "); *Burnside v. White*, 760 F.2d 217, 220 (6th Cir. 1985) ("There is no question that a new parole statute may alter the consequences attached to a crime for which a prisoner has already been sentenced; to the degree that a statute does so, it has retrospective effect."); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170 (7th Cir. 1979) (change in parole review increasing time before which prisoner could be considered for review violated ex post facto clause); *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir. 1977) ("Since parole eligibility is considered an integral part of any sentence, official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription."); *see also Lindsay v. Washington*, 301 U.S. 397, 401 (1937); *Beebe v. Phelps*, 650 F.2d 774, 775 (5th Cir. 1981).

Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989), also emphasizes the constitutional significance of a change in eligibility for parole regardless of whether granting parole is totally discretionary. As in this case, Fender did not argue whether he should or should not be paroled, but simply challenged the denial of his right to eligibility for parole consideration. The Fourth Circuit found an ex post facto clause violation because "the retrospective application of a statute modifying or revoking parole eligibility would ' . . . substantially alter the consequences attached to a crime already completed and therefore

change the "quantum of punishment." ' " *Fender v. Thompson*, 883 F.2d at 305-06 (quoting *Weaver v. Graham*, 450 U.S. 24, 33 (1981), and *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1971)).

Though, in this case, Mr. Graham was not denied every opportunity for parole, the rule still changed to make his punishment more burdensome. When sentenced, Mr. Graham was entitled to be considered for parole after seven years and reconsidered annually thereafter. The Board subsequently changed its rules to provide that he need not be reconsidered more frequently than every eight years. There is a substantial difference between mandated reconsideration annually and mandated reconsideration once every eight years. *See Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979). It is the change in the rules applied after the commission of the crime, after conviction, after sentencing, and after service of a substantial portion of the sentence that violates the ex post facto clause. *See Weaver v. Graham*, 450 U.S. 24, 30-31 (1981).

D. THE ELEVENTH CIRCUIT'S HOLDING THAT THE PAROLE RULE AT ISSUE IS A "LAW" SUBJECT TO THE EX POST FACTO PROVISIONS OF THE UNITED STATES CONSTITUTION DOES NOT CREATE A CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS ADDRESSING THE LEGAL STATUS OF SIMILAR RULES.

The Eighth Circuit's decision in *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991) is not in conflict with the Eleventh Circuit's decisions in *Graham* and *Akins* because the decisions are distinguishable on their facts. Petitioner

cites *Bailey* for the broad proposition that regulations governing the exercise of the power to grant or deny parole are not laws within the meaning of the ex post facto clause. However, the holding of the Eighth Circuit that Minnesota's parole regulations were not laws for ex post facto purposes was premised on the conclusion that the decisions of the state agencies to promulgate parole regulations were discretionary decisions. "[N]either [agency] was required by law to issue specific regulations." *Bailey v. Gardebring*, 940 F.2d 1150, 1156.

In contrast, *Graham* and *Akins* address the constitutionality of a change in a rule that the Georgia Board of Pardons and Paroles was required to make. Georgia law mandates that the Board promulgate rules and regulations that " 'contain an eligibility requirement for parole which shall set forth the time when the automatic initial consideration for parole of inmates under the jurisdiction of the Department of Corrections shall take place and also the times at which periodic reconsideration thereafter shall take place.' " *Akins v. Snow*, 922 F.2d 1558, 1561 (quoting O.C.G.A. § 42-9-45 (1989)). The Eleventh Circuit reasoned that the rule that modified the timing of parole reconsideration obviously would have been subject to the ex post facto clause had it been passed by the Georgia legislature. The court concluded that the mandate to the Board to set the time for parole consideration and reconsideration was "quasi-legislative" in nature and, therefore, had the force and effect of law. Thus, the Board lacked the broad discretion with respect to the timing of parole consideration and reconsideration of the agencies whose regulations were at issue in *Bailey*. The cases addressing federal parole guidelines cited in *Bailey* are

likewise distinguishable. *See Bailey v. Gardebring*, 940 F.2d 1150, 1158-59 (Lay, C.J., dissenting).

The Eleventh Circuit's decision in *Graham* and *Akins* also are consistent with decisions of other circuits that have held parole regulations to be laws for purposes of ex post facto clause analysis. *See Yamamoto v. United States Parole Comm'n*, 794 F.2d 1295, 1300-01 (8th Cir. 1986) ("adverse changes in the frequency with which a prisoner may be *considered* for parole or in the time at which a prisoner first becomes *eligible for parole consideration* may also violate the ex post facto clause"); *Royster v. Fauver*, 775 F.2d 527, 534 (3rd Cir. 1985) (holding that parole regulations may be laws for purposes of ex post facto analysis); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 174 (7th Cir. 1979) (administrative rule may be considered an extension of a statute for purposes of the ex post facto clause).

CONCLUSION

This is a simple case that affects a relatively small number of people. In addition to Respondent Graham, those who are affected by the Eleventh Circuit's decision are inmates serving life sentences in the State of Georgia for crimes committed prior to the effective date in 1985 of the amendment to Rule 475-3-.05, paragraph 2 of the Rules of the Georgia Board of Pardons and Paroles. The relief that the State must grant under the Eleventh Circuit's ruling is to provide an opportunity for reconsideration for parole of each such inmate in accordance with the

rule in effect at the time of the crime of which he was convicted. Any inmate serving a life sentence for a crime committed after the effective date of the 1985 rule need be considered no more frequently than every eight years after an initial review and denial.

The decision of the Eleventh Circuit is consistent with this Court's holding in *Collins v. Youngblood,* and with the decisions of other circuit courts. Therefore, it is respectfully submitted that the Petition of Writ of Certiorari should be denied.

Respectfully submitted,

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